BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

HUMBERTO M. PAREDES
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-159
Case No. 73-393

S.S.A. No.

LUCKY STORES, INC.
(Employer)

Employer Account No.

DEPARTMENT OF HUMAN
RESOURCES DEVELOPMENT

The Department appealed from that portion of Referee's Decision No. OAK-12971 which held that the claimant was disqualified for benefits under section 1256 of the Unemployment Insurance Code; that the employer was entitled to a ruling relieving its reserve account of benefit charges under section 1032 of the code; and that it was unnecessary to decide the issue under section 1257(b) of the code. We have given consideration to the written argument submitted.

STATEMENT OF FACTS

The claimant had been employed by the above employer as a part-time salesclerk beginning May 20, 1970. The claimant was a member of the Air National Guard Reserve. On February 16, 1972 he received a written leave of absence from the employer for the period from February 16, 1972 to August 1, 1972 as it was then contemplated that he would be on active duty for a six-month period.

The claimant was on duty with the Air National Guard from February 20, 1972 to June 19, 1972. After his release from active duty he informed the employer that he would not be returning to work at that time, since he was scheduled to attend a two-week summer camp with the Air National Guard beginning July 19, 1972.

The claimant filed a claim for unemployment insurance benefits effective June 25, 1972. Between June 25, 1972 and July 15, 1972 he looked for work. He then attended the summer camp for two weeks. Upon his return he reopened his claim effective July 30, 1972. He was paid benefits for the four weeks ending August 5, 1972 through August 26, 1972 in the amount of $182, which sum was the subject of a notice of overpayment.

On or about August 1, 1972 the claimant approached the employer and requested full-time work. He was informed by the employer that full-time work was not available, but that his part-time job was available. The claimant did not accept the part-time job, and approximately a week later informed the employer that he had found a better job.

When filing his continued claim for benefits for the week ending August 5, 1972 the claimant advised the Department that no work had been offered to him that week.

The Department did not issue a ruling with respect to the employer but sent the employer a notice of computation as a base period employer. On September 28, 1972 the Department issued a notice of determination holding that the claimant was disqualified under section 1257(a) of the code for a five-week period, and further holding that the claimant was disqualified under section 1257(b) of the code for a five-week period.

The Department contends that the Air National Guard was the claimant's most recent employer; that Lucky Stores, Inc. was only a base period employer, and as such was entitled only to an unfavorable ruling and not to a notice of determination; and that the claimant should not have been disqualified under section 1256 of the code but rather under section 1257(b) of the code.

REASONS FOR DECISION

Section 1256 of the Unemployment Insurance Code provides that an individual is disqualified for benefits, and sections 1030 and 1032 of the code provide that the employer's reserve account may be relieved of benefit charges, if the claimant left his most recent work voluntarily without good cause.

In Appeals Board Decisions Nos. P-B-5 and P-B-154, we held that an individual's "most recent work" as that term is used in section 1256 of the code refers to work in which an employer-employee relationship existed in connection with his services. In Appeals Board Decision No. P-B-5, we also held that "work" and "employment," as used in the code, may logically be accepted as synonymous terms.

Decisions of our predecessors on this board in the past have not been consistent with respect to whether an individual's military service or last civilian employment prior to entering the military service constituted his "most recent work."

Generally speaking, those decisions prior to Douglas Aircraft Company, Inc. v. California Unemployment Insurance Appeals Board, et al. (1960), 180 Cal. App. 2d 636, 4 Cal. Rptr. 723, held that an individual's last civilian employment was his most recent work. (e.g. Benefit Decisions Nos. 5705, 6087 and 6539)

On the other hand, Benefit Decisions Nos. 6673 and 6793 cited the Douglas case in holding that the military service constituted a claimant's most recent work.

The Douglas case held that a leaving of work within the meaning of section 1256 of the code occurred upon the commencement of a leave of absence, even though there was no termination of the employer-employee relationship.

Benefit Decision No. 6793 (which the Department cites herein) pointed out that prior to Douglas, it had been held that a leaving of work occurred only on the severance of the employer-employee relationship and thus when a claimant was on a leave of absence no severance of the relationship occurred and hence there could be no leaving. The board in that case went on to state that since, under Douglas, a leaving of work can occur when a claimant goes on a leave of absence, and since the claimant rendered services for wages while in the military service, the military service was the claimant's last employment. The board also relied upon holdings that a serviceman in receipt of terminal pay or accrued pay was in receipt of wages and considered ineligible for benefits for the period to which such wages were allocated (no longer in point since the enactment of code section 1253.15).

In none of the above cited board cases was there a close examination of the status of a serviceman with respect to whether an employer-employee relationship existed between him and the government. We think it appropriate to make such examination at this time.

Preliminarily, we observe that in the Constitution of the United States, Article I, Section 8, Clause 14, Congress is given the power "To make rules for the government and regulation of the land and naval forces." This is a distinctly separate power given to Congress than the "necessary and proper" clause (Article I, Section 8, Clause 18), which enables Congress to implement the other powers granted in Article I. Therefore, from the beginning the "land and naval forces" have operated under a different set of rules and regulations than civilian employees of the Government of the United States.

The Supreme Court of the United States held in an early case, In re Grimley, (1890), 137 U.S. 147, that an enlistment in the army involved a contractual factor. In deciding the case the court stated in part:

> ". . . This case involves a matter of contractual relation between the parties; and the law of contracts, as applicable thereto, is worthy of notice. The government, as contracting party, offers contract and service.

Grimley accepts such contract declaring that he possesses all the qualifications prescribed in the government's offer. The contract is duly signed. Grimley has made an untrue statement in regard to his qualifications. The government makes no objection because of the untruth. The qualification is one for the benefit of the government, one of the contracting parties. . . ."

* * *

". . . But in this transaction something more is involved than the making of a contract, whose breach exposes to an action for damages. Enlistment is a contract; but it is one of those contracts which changes the status; and, where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. Marriage is a contract; but it is one which creates a status. Its contract obligations are mutual faithfulness; but a breach of those obligations does not destroy the status or change the relation of the parties to each other. The parties remain husband and wife, no matter what their conduct to each other--no matter how great their disregard of marital obligations. . . ."

* * *

"By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties, and although he may violate his contract obligations his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on nor can he, the State not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the State, would not have entered into the new relations with him, or permitted him to change his status. . . ."

The reasoning of the Grimley case was reaffirmed in Bell v. United States (1961), 366 U.S. 393. In that case the Supreme Court of the United States held that United States soldiers who were captured during the Korean War and demonstrated disloyalty to their country while prisoners of war were nevertheless entitled to pay and allowances under the applicable federal statutes. The court cited Grimley to the effect that enlistment is a contract which changes the status and that no breach of contract denounces the status or the obligation that flows from it. The court stated as follows:

> "Preliminarily, it is to be observed that common law rules governing private contracts have no place in the area of military pay. A soldier's entitlement to pay is dependent upon statutory right."

The case of Goldstein v. State (1939), 281 N.Y. 396, 24 N.E. 2d 97, 129 ALR 905, has been widely cited because of its apt language distinguishing the military service from the usual employer-employee relationship:

> "Working men and women, employees of others, under our system of government are free men and women. They have the same standing, rights and privileges possessed by other members of our body politic. They may work or not according to their own free will. If engaged in work they may quit working at any time if they desire without liability therefor unless prevented by the terms of some express contract. They may organize labor unions for the purpose of improving their working conditions. They may engage in strikes against their employers to compel their employers to grant them certain rights or privileges which they deem themselves entitled to. They may even engage in peaceful picketing of their employers' places of business to induce their employers to grant them the rights which they claim.
>
> "Upon the other hand, where a man becomes a member of the State militia he must, when in active service surrender for the benefit of the State certain of the privileges enjoyed by working men who are employees. Under the

> military law . . . a member of the militia may be tried for various military offenses, for acts which are not illegal under any other law. He may be tried and punished by a military tribunal and if found guilty may be punished by fines and in certain cases by imprisonment. He is at all times subject to the commands of his superior officers. He cannot quit while in active service without consent of his superiors. . . . It seems clear that one who joins the State militia and is engaged in active service therein is in no sense an employee of the State. He is simply performing a duty which he owes to the sovereign State as a resident and citizen. It makes no difference whether he does that voluntarily in time of peace or in response to the call of the governor in time of trouble."

The Goldstein case was cited by Martin v. Riley (1942), 20 Cal. 2d 28. The California Supreme Court stated:

> ". . . The militia is governed by laws relative to military affairs and not by laws regulating civil matters unless an unmistakable intention to the contrary clearly appears. Military service is based on a duty owed to the sovereign, may be compulsory . . . and cannot be terminated at will. . . ."

From the foregoing it is apparent that the status of a military serviceman is quite different from that of an employee in the traditional or common-law employer-employee relationship. In a sense, military service might be referred to as a form of voluntary or involuntary servitude. In an employer-employee relationship an employee has a paramount right to terminate the relationship at will.

We therefore conclude that the "work" last performed by the claimant herein was in the service of Lucky Stores, Inc.

Consistent with our holding in Appeals Board Decision No. P-B-11, we further conclude that when the claimant failed to return to work following his release from active duty on June 19, 1972 when the purpose of his military leave had been accomplished and chose to file his claim for benefits effective June 25, 1972, he severed the employer-employee relationship which had existed between him and his employer and, in effect, voluntarily left his most recent work.

Under section 5108, Title 22, California Administrative Code, we are prohibited from considering any issue which might affect the claimant's entitlement to benefits prior to the effective date of the determination under appeal. The claimant's leaving of his most recent work in June 1972 antedated the determination under appeal by approximately three months. Such leaving raises a separation issue under section 1256 as well as the employer's entitlement to a ruling under section 1032 of the code. These matters should be referred to the Department for its consideration.

Since we have found that the employment relationship ended in June 1972, the employer's subsequent offer of work on or about August 1, 1972 amounted to an offer of new work. We must therefore determine whether the claimant refused an offer of suitable work without good cause.

Section 1257(b) of the code provides that an individual may be disqualified for unemployment benefits if he, without good cause, refused to accept suitable employment when offered to him. Section 1258 of the code defines "suitable employment" as (1) "work in a person's usual occupation" or (2) work "for which he is reasonably fitted."

The work which the employer offered to the claimant was that of his former part-time job. Such work was in the claimant's usual occupation and within his prior training and experience. It was not shown that the wage was below the prevailing wage for such work. The claimant was not prevented from seeking other work during his off hours. The mere fact that the offered work was part time does not render it unsuitable. We conclude that the part-time work offered to the claimant was suitable employment within the meaning of section 1257(b) of the code. It remains only to be determined whether the claimant had good cause for refusing such work.

At the time of the offer the claimant had no prospect of other employment. The acceptance of part-time work would not have prevented him from seeking full-time employment during those hours of the day when he was not working. The claimant therefore had no valid or compelling reason for refusing such work, and he was properly subject to disqualification under sections 1257(b) and 1260(b) of the code.

DECISION

The appealed portion of the referee's decision is modified. The claimant is disqualified for benefits under section 1257(b) of the code for the period determined by the Department. The claimant's entitlement to benefits under section 1256 of the code, and the employer's entitlement to a ruling under code section 1032 are referred to the Department for its consideration.

Sacramento, California, March 7, 1974

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

JOHN B. WEISS

DON BLEWETT

CARL A. BRITSCHGI

EWING HASS